UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ANDREW N. PRICE, Plaintiff, v. J&H MARSH & McLENNAN, INC., Defendant.	:	Docket No. 2:03-cv-292

MEMORANDUM AND ORDER

Plaintiff Andrew N. Price, President of Champlain Enterprises, Inc., d/b/a/ Communtair ("Champlain") seeks relief pursuant to the Declaratory Judgment Act ("DJA"), 28 U.S.C.A. § 2201-2241 (West 1994), against Champlain's former insurance broker, J&H Marsh & McLennan, Inc. ("Marsh"), based on theories of negligence and breach of contract. Marsh moves to dismiss the counts against it pursuant to Fed. R. Civ. P. 12(b)(6) and in the alternative, moves to transfer the action to the Southern District of New York. Price opposes the motion to dismiss or transfer and alternatively moves for leave to file an amended complaint. Marsh's motion to dismiss or transfer is GRANTED in part and DENIED in part. Price's motion for leave to file an amended complaint is GRANTED.

BACKGROUND

For purposes of this motion, the following facts are taken

from Price's complaint and assumed to be true; all reasonable inferences are drawn in Price's favor. Champlain is a New York corporation with a principal place of business in New York. Plaintiff Price is a resident of South Burlington, Vermont, who at all relevant times was the president of Champlain. Marsh is a Delaware corporation that operates as an insurance broker in Vermont.

On April 28, 1999, Price, acting in his capacity as president of Champlain, consulted with Marsh's assistant vice-president regarding the purchase of Director's and Officer's Liability Insurance ("D&O insurance"). Price inquired if the D&O insurance would apply to acts of Champlain's directors and officers that occurred prior to the policy inception date. Marsh's assistant vice-president informed Price that the coverage could be written so as to include prior acts coverage if Price submitted a list of "subjectivities."

The next day, Price sent Marsh's assistant vice-president a letter outlining the requested subjectivities in the format suggested by Marsh. Marsh never questioned the efficacy of the letter.

On May 25, 1999, Marsh's assistant vice-president sent Price a letter which enclosed "our binder confirming that the captioned policy has been bound for the term of May 20, 1999." Compl. ¶ 8 (Doc. 2). May 20, 1999 became the policy inception date. The

binder, prepared by Marsh, identified Chubb Custom Insurance Company ("Chubb") as the insurer. The binder confirmed that Marsh, acting as Champlain's insurance broker, had arranged for Chubb to provide Champlain with various liability coverages. The binder also stated that the exclusion of the prior acts of Champlain's directors and officers would be removed from the D&O coverage "upon receipt and acceptance of a signed Chubb application and warranty." Compl. ¶ 10.

Marsh's assistant vice-president provided Price with a form application for the liability insurance policy which Price completed and signed on May 28, 1999. Marsh never advised Price that the paperwork was inadequate. Marsh never informed Price, or any other representative of Champlain, that Chubb had refused Price's request that the D&O insurance cover prior acts of directors and officers. On August 1, 1999, Marsh's assistant vice-president sent Price a letter enclosing the insurance policy and stating "we have reviewed the policy and all appears to be in good order." Compl. ¶ 13.

In November 2001, two Champlain employees brought action against the company alleging that Champlain, Price and other directors and officers committed wrongful acts with respect to the creation and administration of a an employee stock ownership plan. Most, but not all, of the allegedly wrongful conduct took place prior to the insurance policy's inception date.

Price and the other individual defendants in the action tendered the complaint to Chubb and requested that Chubb defend and indemnify them. Chubb denied coverage, claiming that the D&O insurance contained a prior acts exclusion. Champlain brought action against Chubb contesting the denial of coverage. The United States District Court for the Northern District of New York held that the D&O insurance policy contained a prior acts exclusion and dismissed the action. Champlain Enters. v. Chubb Custom Ins. Co., No. 1:02-cv-1579, slip op. at 13 (N.D.N.Y. Apr. 7, 2003)

On October 6, 2003, Price filed a Complaint for Declaratory Judgment against Marsh in Chittenden County Superior Court. On October 23, 2003, Marsh removed to this Court based on diversity jurisdiction. See 28 U.S.C.A. § 1332 (West 1993 & Supp. 2003). In Count 1 of the Complaint, Price alleges that Marsh:

> breached the applicable standard of care of a prudent insurance broker by failing to use reasonable care and diligence in the procurement of D&O Coverage with prior acts included such as would meet the expressed needs and objectives of Plaintiff (and his fellow officers and the company directors) and in misrepresenting to Plaintiff that the policy appeared "to be in good order," when in fact, contrary to such expressed needs and objectives, the policy which Chubb issued and transmitted to Defendant contained a prior acts exclusion.

Compl. ¶ 20(a).

In Count 2, Price asserts that Champlain "assigned to Plaintiff its rights against Defendant for insurance brokerage

and for breach of contract." Id. ¶ 23. As assignee of Champlain's rights, Price repeats the allegations set forth in Count 1 and further alleges that Marsh "breached its contractual responsibility" to Champlain. Id. ¶ 24(a).

LEGAL STANDARD

When deciding a motion to dismiss pursuant to Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accepting the complaint's allegations as true." Todd v. Exxon Corp., 275 F.3d 191, 197-98 (2d Cir. 2001). A district court may grant a motion to dismiss for failure to state a claim only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 198 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Therefore, "'[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

DISCUSSION

I. Negligence

The parties agree that New York law is controlling, but dispute its application. Marsh avers that the three-year statute of limitations for negligence actions, C.P.L.R. § 214(4), governs this action. According to Marsh, the allegedly negligent acts occurred no later than August, 1999; as a result, Price's

complaint, filed in October of 2003, is untimely. For his part, Price argues that the cause of action did not accrue until the ESOP action was filed and Chubb denied coverage in November, 2001. Therefore, the action is not time-barred under the three-year statute of limitations. In the alternative, Price claims the Complaint is governed by the six-year statute of limitations for breach of contract claims set forth in C.P.L.R. § 213(2).

Under New York law, a malpractice action against an insurance broker is governed by the limitations periods applicable to negligence and breach of contract actions. Chase Sci. Research, Inc. v. NIA Group, Inc., 749 N.E.2d 161, 168, (N.Y. 2001). Thus, the Court applies the three-year statute of limitations period set forth in C.P.L.R. § 214(4) to Price's negligence claims and the six-year statute of limitation set forth in C.P.L.R. § 213(2) to the breach of contract claim.

A cause of action sounding in tort accrues when "an injury is sustained," not upon "the wrongful act of defendant or discovery of the injury by plaintiff." Kronos, Inc. v. AVX Corp., 612 N.E.2d 289, 292 (N.Y. 1993) (applying C.P.L.R. § 214(4) in an action for interference with contractual relations). In other words, the cause of action accrues "when all the elements of the tort can be truthfully alleged in a complaint." Id.

In negligence claims against insurance brokers for failure

to procure adequate insurance coverage, New York's Appellate Division courts have held that the cause of action accrues when the broker fails to procure adequate coverage. Mauro v. Niemann Agency, Inc., 303 A.D.2d 468, 469 (N.Y. App. Div. 2003) (cause of action accrued when policy without maximum amount of supplementary uninsured motorist coverage was issued); Morse Diesel Int'l, v. CNA Ins. Co., 272 A.D.2d 455, 456 (N.Y. App. Div. 2000) (cause of action accrued when broker failed to have plaintiff named as additional insured). Moreover, Appellate Division courts have expressly rejected the argument that the cause of action accrues when the insurer denies coverage. Morse Diesel Int'l, 272 A.D.2d at 456; Video Corp. of America v. Frederick Flatto Assoc., 85 A.D.2d 448, 456 (N.Y. App. Div. 1982). Implicit in these holdings is the courts' assessment that an injury occurs, and therefore the elements of negligence exist, when the broker fails to procure adequate coverage, not when the insurer later disclaims coverage.

The holdings of intermediate state appellate courts are "'dat[a] for ascertaining state law which [are] not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" Michalski v. Home Depot, Inc., 225 F.3d 113, 116 (2d Cir. 2000) (quoting West v. AT&T, 311 U.S. 223, 237 (1940)). Price has produced no authority indicating that the Court of

Appeals would reach a determination different from that of the Appellate Division courts. Accordingly, the Court concludes that Price's cause of action accrued when Marsh procured the inadequate insurance, no later than August of 1999. His negligence claims in Counts 1 and 2 are therefore time-barred under C.P.L.R. § 214(4).

II. Breach of Contract

A. Statute of Limitations

As discussed, the six-year statute of limitations under C.P.L.R. § 213(2) governs Price's breach of contract claim in Count 2 of the Complaint. Because it was filed within six years of the alleged breach, Price's claim is timely.

B. Collateral Estoppel

According to Marsh, in Champlain Enters., No. 1:02-cv-1579, the district court for the Northern District of New York determined that Price was responsible for failing to procure prior-acts coverage. Marsh therefore contends that Count 2 of the Complaint is barred by collateral estoppel.

Collateral estoppel "precludes a party from relitigating in a subsequent proceeding an issue of law or fact that has already been decided in a prior proceeding." Boguslavsky v. Kaplan, 159 F.3d 715, 719-720 (2d Cir. 1998). Collateral estoppel applies if "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous

proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." Id. at 720 (internal quotation marks and citations omitted).

The Northern District of New York made no determination whatsoever regarding Marsh's alleged breach of contract. Marsh was not a party to the prior action between Price and Chubb. As a result, Price's claims against Marsh are not precluded by the Northern District of New York's holding.

C. Adequacy of the Complaint

Count 2 of the Complaint alleges that Marsh breached its contractual responsibility by "failing to use reasonable care and diligence in the procurement of D&O Coverage with prior acts included." Compl. ¶ 24(a). In order to state a claim in federal court for breach of contract under New York law, the complaint must only allege (1) the existence of an agreement; (2) adequate performance of the contract by the plaintiff; (3) breach of contract by the defendant; and (4) damages. Harsco Corp. v. Segui, 91 F.3d 337 (2d Cir. 1996); Tagare v. Nynex Network Sys. Co., 921 F. Supp. 1146, 1149-50 (S.D.N.Y. 1996). "Each element need not be separately pleaded; all that is necessary is 'a short plain statement of the claims showing that the pleader is entitled to relief.'" Tagare, 921 F. Supp. at 1150 (quoting Fed. R. Civ. P. 8(a)(2)).

Read liberally and in the light most favorable to Price, the Complaint alleges that Marsh agreed to procure D&0 insurance with prior acts coverage for Champlain. Compl. ¶¶ 6-13. The Complaint also alleges that Champlain complied with the terms of the agreement and that Marsh breached. Id. ¶¶ 6-13, 24(a). These allegations are sufficient to satisfy the requirements of notice pleading. Nevertheless, Price fails to allege any damages arising from Marsh's breach and therefore fails to state an adequate claim for breach of contract.

III. Declaratory Judgment

Price seeks relief in the form of declaratory judgment. Section 2201 of the DJA states that in a case involving an "actual controversy" a federal court "may declare the rights and other legal relations of any interested party seeking such a declaration." 28 U.S.C.A. § 2201(a). Federal courts have "unique and substantial discretion in deciding whether to declare the rights of litigants." Wilton v. Steven Falls Co., 515 U.S. 277, 286 (1995). The Second Circuit has set forth two criteria to aid district courts in exercising this criteria: "'(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" Continental Cas. Co. v. Coastal Sav. Bank, F.2d 734, 737 (2d Cir. 1992) (quoting

Broadview Chem. Corp. v. Loctite Corp., 417 F.2d 998, 1001 (2d Cir. 1969)). These are not the only guideposts, however. Courts must consider "the litigation situation as a whole" to determine whether declaratory judgment is appropriate. Great Am. Ins. Co. v. Houston Gen. Ins. Co., 735 F. Supp. 581, 584 (S.D.N.Y. 1990).

The purpose of the DJA is to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage has accrued." Luckenbach Steamship Co. v. United States, 312 F.2d 545, 548 (2d Cir. 1963); see also In re Combustible Equip. Assoc., 838 F.2d 35, 37 (2d Cir. 1988) (purpose of the DJA is "to enable parties to adjudicate claims before either side suffers great damages"). Thus, declaratory relief is to operate prospectively and is inappropriate for past acts. See Nat'l Union Fire Ins. Co. v. Int'l Wire Group, Inc., No. 02 Civ. 10338, 2003 WL 21277114, at *5 (S.D.N.Y. June 2, 2003) (citing Gianni Sport Ltd. V. Metallica, No. 00 Civ. 0937, 2000 WL 1773511, at *4 (S.D.N.Y. Dec. 4, 2000)).

The Complaint alleges that Marsh breached when it failed to procure for Champlain a D&O insurance policy that covered prior acts. Compl. ¶ 24(a). Therefore, Marsh's past conduct is the focus of the allegation; declaratory judgment is inappropriate.

IV. Leave to Amend

In the event the Court finds the Complaint deficient, Price moves for leave to amend. Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In order to determine whether to grant leave to amend, the Court should consider the following factors: (1) whether the motion is being made after an inordinate delay without adequate explanation; (2) whether prejudice to the defendants would result; (3) whether granting the motion would cause further delay; and (4) whether the amendment would be futile. Mountain Cable Co. v. Pub. Serv. Bd. of Vermont, 242 F. Supp. 2d 400, 403 (D. Vt. 2003) (citing Grace v. Rosenstock, 228 F.3d 40, 53-54 (2d Cir. 2000)).

Marsh does not contend that Price's motion for leave to amend should be denied based on the first three of these factors. The only question, then, is whether the amendment would be futile. Based on the allegations in the Complaint, the Court cannot conclude that an amended complaint would be futile and therefore grants Price thirty days to amend.

V. Transfer

Finally, Marsh moves for the case to be transferred to the Southern District of New York. A district court may transfer a civil action to another district where it might have been brought "[f]or the convenience of the parties and witnesses, [and] in the

interest of justice." 28 U.S.C.A. § 1404(a) (West 1993 & Supp. 2003). A plaintiff's choice of venue is entitled to substantial consideration, however. E.g., In re Warrick, 70 F.3d 736, 741-42 (2d Cir. 1995).

The Queen City is Vermont's most cosmopolitan and accessible metropolis. Cf. Miller v. Malloy, 343 F. Supp. 46, 50 (D. Vt. 1972) ("Vermont may no longer be thought of as having only dirt roads and an inadequate transportation and highway system."). The primary witnesses in this case are Price, who is a resident of Vermont, and Marsh's employees from its New York and New Jersey offices. There are no significant convenience or justice concerns that warrant disregarding Price's choice of venue.

VI. Conclusion

For the reasons set forth above, Marsh's Motion to Dismiss or Transfer Venue (Doc. 9) is GRANTED in part and DENIED in part. The motion to transfer venue is DENIED. The negligence claims are dismissed as time-barred. The contract claim is dismissed with leave to amend. Price has thirty days from the date of this order to file his amended complaint.

Dated at Burlington, Vermont this ____day of June, 2004.

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William K. Sessions III
Chief Judge, U.S. District Court